

authority of the Commonwealth without treaties or other conditions governing their relationship as distinct sovereign peoples? The concept of legitimacy is at least as contested as the concept of sovereignty, but its centrality to the concept of constitutional democracy and its connections with the concepts of reasonableness and justice provide further reason for believing that, sooner or later, these questions will have to be answered.

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Reynolds puts the case that if Aboriginal peoples in Australia had sovereignty prior to the arrival of the British, then the Crown could not simply make an abstract claim to sovereignty over the whole of the Australian territory as it purported to do. Ultimately, Reynolds argues, the Crown will be required to establish how and when Aboriginal sovereignty was overridden. He believes that doing so will raise 'jurisprudential, political and moral issues'.

Reynolds' outline of the weaknesses in the Australian jurisprudence on sovereignty is persuasive. Also persuasive is his argument that international law at the time required actual occupation or effective administrative control to secure external sovereignty, and that this did not occur in some parts of Australia until well into the 20th century. What is left unclear in Reynolds' discussion is what follows from the weakness of the British claim to sovereignty. Reynolds claims that 'much else follows' but I am not sure that this is necessarily the case. Furthermore, I believe there are powerful reasons not to put the Crown to the test on the question of sovereignty, for what follows may in fact be detrimental to Aboriginal claims to cultural and political rights.

There are two problems with pursuing the sovereignty question further. First, there may be nothing to gain by pushing the Crown to fully articulate how and when full British sovereignty was secured over Australia. The difficulty with relying on international law to bolster claims for Indigenous sovereignty is that anything resembling an Aboriginal claim to sovereignty only began to be made in the 1930s, by which time British colonisation had probably progressed far enough for a comprehensive claim of sovereignty to be made, whether by settlement or conquest. Certainly if an Aboriginal community in the Kimberley, Arnhem Land, the West Coast of Cape York or the central deserts had made a claim to sovereignty that was communicated to a relevant international or British authority in the 19th century, it should have been persuasive. But such claims were either not made in such terms, or even if they were, they were not acknowledged to have been made.

Furthermore, if the British could only secure sovereignty over these areas through occupation or effective administrative control, there is probably a reasonable legal argument that these conditions were satisfied by the time land was divided into titles granted of and from the Crown. In holding that all statutory grants conferred

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prior to 1975 were rightfully conferred even if inconsistent with native title, the High Court would seem to have acknowledged as much.¹⁷

Second, there may be something to lose by pursuing the sovereignty question further. The focus on sovereignty is a distraction from, and may even undermine, the powerful political claims Aboriginal Australians make for the official recognition of their different status and rights within the Australian community. In this sense, Reynolds finishes his discussion of sovereignty at the point where I believe it should start. The elder of the Yawuru nation quoted at the end of Reynolds' analysis makes a statement of an authority that exists *regardless* of any official recognition of Indigenous internal or external sovereignty by the courts. Although he employs the language of sovereignty, his true focus is on an existing system of governance, which does not rely on an imposed concept of sovereignty.

The danger of pushing an official claim to sovereignty is that it devalues the strength of Aboriginal claims to a self-governing authority which pits itself against the State. The legal uncertainty surrounding the origins of British sovereignty generates political possibilities. Tying up the loose ends of the sovereignty question may narrow the space for making Aboriginal claims to self-government and other rights. Relevantly, Taiaiake Alfred has argued that sovereignty ought to be abandoned as a concept to advance Indigenous claims because it is an 'exclusionary concept rooted in an adversarial and coercive Western notion of power'.¹⁸ There is considerable force in Alfred's critique: reclaiming a concept which is rooted in non-Indigenous claims to ultimate legal authority is to begin a discussion of political rights from a position of profound disadvantage.

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On 3 June 1992 the Australian High Court provided the nation with a narrow and short-lived window into a world where law not only followed justice, but allowed itself to be shaped by international human rights standards. That window has all but closed since then. Over the intervening decade and a half, Indigenous land relationships have been distorted in an attempt to fit them into incongruous European concepts such as partial extinguishment. The test for the maintenance of an ongoing traditional connection has descended into a perverse interrogation of Indigenous identity. In this context, Henry Reynolds' questioning of how Aboriginal sovereignty was overridden is refreshing. It is a noble attempt to re-open a window that once held so much promise.

¹⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J summarising the position of the Court on this issue).

¹⁸ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (1999) 59.

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